IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI JOGINDER SINGH, JM AND SHRI SHAMIM YAHYA, AM

M.A. No.261/Mum/2017
(Arising out of ITA No. 5289/Mum/2011)
(Assessment Year: 2001-02)

Dy. CIT-11(2)(1), Mumbai	Vs.	M/s. Sheetal Diamonds Ltd. Off No. 8, 1st Floor, Sitaram Niwas, 1st Bhatwadi, JSS Road, Opera House, Mumbai-400 004
PAN/GIR No. AABCS 3005 P		
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Ms. R. Kavitha
Respondent by	:	Shri B. V. Jhaveri

Date of Hearing		31.08.2018
Date of Pronouncement	:	05.09.2018

O R D E R

Per Shamim Yahya, A. M.:

By way of this M scellaneous Application (' MA' for short), the Revenue seeks recall of the order of this Tribunal in ITA No. 5289/Mum/2011 for assessment year ('A.Y.' for short) 2001-02 vide order dated 28.07.2015.

2. The submissions of the Revenue as contended in MA reads as under:

> In this connection, it is submitted that, the assessee has preferred appeal before the Hon'ble ITAT on the following grounds in ITA.5289/Mum/2011 for A.Y.2001-02.
> "1) The Commissioner of Income-tax (Appeals) erred in confirming the penalty ofRs. 13,69,656/-levied by the Dy.CIT"
> "2) The Commissioner of Income-tax (Appeals) erred in directing the Dy.C.LT. to levy penally on the amount of Rs.4,04,27,000/-. "

"3) The order of the Commissioner of Income-tax (Appeals) confirming penalty and directing the Assessing Officer to levy penalty on the enhanced amount of Rs.4,04,27,000/- is bad in law and without jurisdiction."

The Honble ITAT, 'E' Bench, Mumbai has decided appeal filed by the assessee vide ITA.5289/ Mum/2011 dated 28.07.2015.

Gist of the case:

For A.Y.2001-02, assessee filed ROI declaring loss of Rs.3,69,63,900/-. During the course of the assessment proceedings, the AO noticed that assessee is showing major part of its expenses in the form of opening stock and purchases. The assessee was given ample opportunity to submit details of purchases made during the year, but assessee willfully choose not to submit the details called for. Accordingly, the trading results were rejected and the net profit was estimated at 10% of the sale value and accordingly the total income of the assessee was determined at Rs.34,63,100/-. The order of the AO u/s 143(3) was confirmed and upheld by the Ld. CIT(A). The assessee preferred further appeal before the HonTDle ITAT. The Hon'ble ITAT determined the income of the assessee for the A.Y.2001-02 at NIL vide the order No.ITA No.2366/Mum/2005 date 22/08/2008. The order of the Honble ITAT negates the positive income but at the same time assessee's claim of loss stands rejected by the Honble ITAT as the total income has been determined at NIL.

In the meantime, after the deliverance of the Ld.CIT(A)'s order, Penalty u/s. 271(1)(c) was levied on the conc alment of Rs.34,63,100/-. Assessee preferred appeal before the Ld.CIT(A) for the issue of Penalty U/s.271(c) also, who in turn directed to enhance the penalty. As per the direction of CIT(A) penalty ought to be levied on Rs.4,04 27 000/- (Rs.3,69,63,900 + Rs.34,63,100).

The assessee preferred an appeal before the Hon'ble ITAT deleted by the Hon'ble ITAT by observing as under :

> "We find that the AO had completed the assessment determining the income of the assessee at Rs.34.63 lakhs, that the Tribunal had reduced the income for the year under appeal at Rs NIL, that the company is now defitnct and had suffered a loss of Rs 3.64 crores in the immediate preceding AY, that the AO or the FAA did not have the benefit of the order of the Tribunal As the addition made by the AO have been deleted by the Tribunal in the quantum appeal, so in our opinion the penalty imposed by the AO/enhanced by the FAA would not survive."

Here it is worthwhile to mention that Hon'ble ITAT vide Order No. 2366/Mum/2005 dated 22.08.2008 has enhanced the income of the assessee from Rs.(-) 3,69,63,900/-to NIL thereby confirms the view taken by the AO that the assessee has furnished inaccurate particulars of income by claiming returned loss to the tune of Rs. 3,69,63,900/-. Thus, the penalty to the extent of loss confirmed is in line with the Hon'ble ITAT's order.

Hence, Miscellaneous Application is being filed to correct the figures and to clarify the fact that reduction of loss to NIL income would amount to furnishing of inaccurate particulars and would attract Penalty u/s.271(l)(c) of the I T Act, 1961. A copy of approval of Pr.CIT-11, Mumbai to file Miscellaneous Application is enclosed herewith.

3. In terms of the above MA, we have heard both the counsel and perused the records.

4. To recapitulate the issue in this appeal before the Tribunal was against the levy of penalty by the confirmation of the levy of penalty by the ld. CIT(A) which included enhancement by the ld. CIT(A) amounting to Rs.4,04 27 000/-.

5. The brief facts of the issues were that the assessee had returned income declaring a loss of Rs.3.69 crores. The Assessing Officer ('A.O.' for short) determined the income of the assessee at Rs.34.63 lacs. The ld. CIT(A) confirmed the order of the A.O. when the matter travelled to the ITAT. The ITAT vide its order dated 22.08.2008 has decided the issue as under:

> "3. We have considered the rival submissions and perused the relevant material on record The learned A.R. has vehemently argued before us that it had furnished complete details of purchase and sale before the Assessing Officer and hence the action of the A. O. in rejecting the books of account was not as per law. It was further stated that due to illness of the Managing Director of the company,the business operations were closed in this year and the stock was sold at throwaway price.He still further submitted that the company has been declared as defunct thereafter.In the opposition the ld. DR relied on the impugned order. We are not convinced with the submission advanced on behalf of the assessee for the obvious reason that the party-wise details of purchase required by the Assessing Officer was not furnished as has been noted in the assessment year. Now the learned A.R. has relied on page 115 of the paper book to contend that the detail of purchase was given to the Assessing Officer. We observe from such detail of purchase that the total has been shown at Rs.2,92,41,677 whereas in the trading account, the figure of purchase has been reflected at Rs.2,77 ,06,042. On a

> pointed query the learned A.R. has failed to reconcile these two figures. These facts indicate that the books of account were not properly maintained by the assessee from which correct total income could be deducted. At the same lime,we further observe that the Assessing Officer, too, has no basis for applying net profit rate of 10% on the sales value. Though he has mentioned in the assessment order that he was applying this net profit rate after considering the comparable cases, but there is no whisper about any such comparable case whatsoever. It is a settled legal position when the books of account are rejected the Assessing Officer should be guided by the profit rate of the assessee in the preceding year,unless the facts justify departure therefrom.Coming back to-the facts of the instant case,we note from the written submissions filed - before the learned CIT(A) that in the immediately preceding year there was a gross loss of Rs.354 lakhs. The learned A.R. has stated that the company was consistently suffering losses from year to year basis and was eventually closed.Under the present circumstances, no useful purpose would be served by sending the matter back to the file of the Assessing Officer for a fresh decision, as was initially suggested by the learned A.R. Taking into consideration the totality of the facts and circumstances prevailing in this case, we are of the considered opinion that it would be just and fair if the net income from trading operations is taken at Rs. Nil. Both the sides have agreed to this proposal from the Bench during the course of hearing. We order accordingly."

6. From the above, it is evident that in the order of the ITAT, the loss declared by the assessee at Rs.3.69 crores was reduced to Nil.

7. In the penalty proceedings in this case, the A.O. had levied penalty based upon his treatment of loss declared by the assessee at Rs.3,69,63,900/- to a profit of Rs.34.63 lacs. Penalty on this amount was levied at Rs.13,69,656/-. When the penalty appeal was contested by the assessee before the ld. CIT(A), he interalia confirmed the amount of penalty and also enhanced the same. While enhancing the same, the ld. CIT(A) referred to Hon'ble Apex Court decision in the case of *Virtual Soft Systems Ltd. vs. CIT* [2007] 289 ITR 83 (SC) and referred as under:

> "Further, the plain reading of clause (a) of Explanation 4 to section 271 as it stood prior to the 2002 amendment, shows that this clause applied to a situation where

> an assessee has returned a loss which by reason of the addition of the concealed income thereto by the Assessing Officer, is converted into a positive figure of the assessed income on which the assessee is required to pay tax. In contrast, clause (c) of the said Explanation 4 applies only to a situation where the assessee has returned a positive income, which stands enhanced by reason of the concealed income added thereto by the Assessing Officer in the assessment order. Consequently, both under clause (a) and clause (c) of the said Explanation 4, the assessee can be penalized only if he has a positive assessed income on which tax is payable. The only difference between clause (a) and clause (c) is that clause (a) applied to an assessee who had filed a loss return, and clause (c) to an assessee who has filed a positive return. However, The end result in both the cases was the same, i.e., a positive assessed income on which the assessee was required to pay tax. It is this basic condition" "precedent for the imposition of the penalty, i.e., existence of liability to pay tax which existed prior to 2002 which has been done away with for the first 'time by the Finance Act, 2002 "

8. Referring to the above, along with the provision of the law, the ld. CIT(A) held that the Hon'ble Apex Court had held that when the loss return has been converted into positive income, the provision of clause (a) to Explanation (4) to Section 271(1)(c) would come into operation and once the Clause (a) comes into operation the whole amount of concealed income is to be considered for levy of penalty. He, therefore, held that the A.O. was not justified in levy ng the penalty only on amount of Rs.34,63,100/-. He held that the A.O. is therefore directed to levy penalty on an amount of Rs.4,04,27,000/-.

9. Against the above order, the assessee appealed before the ITAT.

10. The ITAT noted the facts of the case. The Tribunal thereafter held as under:

> 3.Before us,Authorised Representative(AR)submitted that the AO and the FAA had levied the penalty/confirmed the penalty order before the order of the Tribunal was pronounced,that the Tribunal had determined the income of the assessee at Rs.nil,that there was no justification for enhancing the penalty,that the assessee-company was defunct.Departmental Representative(DR) supported the order of the FAA.

> 4.We have heard the rival submissions and perused the material on record.We find that the AO had completed the assessment determining the income of the assessee at Rs.34.63 lacs,that the Tribunal had reduced the income for the year under appeal at Rs.NIL,that the company is now defunct and had suffered a loss of Rs.3.54 Crores in the immediate preceding AY.,that the AO or the FAA did not have the benefit of the order of the Tribunal.As addition made by the AO have been deleted by the Tribunal in the quantum appeal,so,in our opinion the penalty imposed by the AO/enhanced by the FAA would not survive.

11. The Tribunal for deleting the penalty only mentioned that the company is now defunct and has suffered the loss of Rs.3.54 crores in the immediately preceding assessment year and that the A.O. or the ld. CIT(A) did not have the benefit of the order of the Tribunal. The Tribunal concluded that "As the addition made by the AO have been deleted by the Tribunal in the quantum appeal, so in our opinion the penalty imposed by the AO/enhanced by the FAA would not survive." From the above order, it is evident that the Tribunal has gone on the premise that when the income determined of the assessee is Nil, there is no justification for levying/enhancing the penalty.

12. Against the above order, the Revenue has filed a Miscellaneous Application.

13. The ld. Depar mental Representative ('ld. DR' for short) referred to the MA and submitted that the Tribunal had not considered the order of the ld. CIT(A) in the penalty proceedings and she relied upon the submission made in the miscellaneous application as above.

14. Per contra, the ld. Counsel of the assessee submitted that there is no mistake apparent from the record. He in this regard referred to the decision of the Hon'ble Bombay High Court decision in the case of *CIT vs. Ramesh Electric And Trading Co.*

[1993] 203 ITR 497 (Bom) for the proposition that only mistake apparent from the record can be rectified that failure of the tribunal to consider the arguments is not an error apparent from the record. That the same may be an error in judgment but cannot be a mistake apparent from the record. Furthermore, the ld. Counsel of the assessee submitted that the assessee has duly mentioned the decision of the Hon'ble Bombay High Court decision in the case of *CIT vs. Upendra V. Mithani* vide order dated 05.08.2009 in Income Tax Appeal (L) No. 1860 of 2009 before the Tribunal in the penalty proceedings. In the said decision, the Hon'ble jurisdictional High Court has expounded as under:

> 2. The issue involved in the appeal revolves around deletion of penalty under Section 27l(l)(c) of the I.T.Act. The Tribunal has concurred with the view taken by the Commissioner of Income Tax (A). The Commissioner of Income Tax (A) has rightly taken a view that no penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If the assessee gives an explanation which is unproved but not disproved i e it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false. The view taken by the Tribunal is a reasonable and possible view. The appeal is without any substance. The same is dismissed in limine with no order as to costs.

15. The ld. Counsel of the assessee has submitted that the ITAT has duly decided the issue giving due consideration to the above said Hon'ble jurisdictional High Court decision. Hence, he submitted that there is no mistake apparent from the record in the penalty order passed by the ITAT.

16. Upon careful consideration, we note that the ld. CIT(A) in its order while confirming and enhancing the amount of penalty had quoted the decision of the Hon’ble Apex Court in the case of *Virtual Soft Systems Ltd.* (supra). In the said decision it was held that after the amendment by Finance Act, 2002, the proposition stand altered that in

the absence of any positive income and no tax being levied, penalty for concealment of income could not be levied. The effect of this Hon'ble Apex Court decisions is that reduction of loss will also have to be taken into account while considering the quantum upon which the penalty is to be levied. Admittedly, in its order, as above, this Tribunal failed to take into account this order from the Hon'ble Apex Court and had held that reduction of the loss to nil by the ITAT would also result in non levy of penalty.

17. In this regard, we note that the Hon'ble Apex Court in the case of *Asst. CIT vs. Saurashtra Kutch Stock Exchange Securities Ltd.* [2013] 33 taxmann.com 118 (Gujarat) has expounded that non consideration of Hon'ble Apex Court decision even if it is not cited before the Tribunal would result in the order of the Tribunal suffering from mistake apparent from the record. In this regard, we may gainfully refer to the exposition by the Hon'ble Apex Court in this case in brief as under:

> Where the Tribunal had dismissed the appeal filed by the assessee by holding that it was not entitled to exemption u/s 11 and subsequently, on an application filed by the assessee u/s 254(2), recalled the said order on the ground that it had not considered a judgement of the jurisdictional High Court and that there was a mistake apparent from the record and the question arose whether such recall was justified, HELD, upholding the order of the Tribunal:
> (i) A mistake apparent from the record is one that is patent, manifest and self-evident and which does not require elaborate discussion of evidence or argument to establish it;
> (ii) The non-consideration of a decision of jurisdictional Court or of the Supreme Court is a "mistake apparent from the record" irrespective of whether such decision was rendered prior or subsequent to the rectification;
> (iiii) A judicial decision acts retrospectively because it is not the function of the Court to pronounce a `new rule' but to maintain and expound the `old one'. Judges do not make law; they only discover or find the correct law. A subsequent decision which alters the earlier one has to be applied retrospectively;
> (iv) Rectification of an order stems from the fundamental principle that justice is above all. It is exercised to remove the error and to disturb the finality.

In the present case, the decision of the Hon'ble Apex Court was referred by the ld. CIT(A), which was lost site of by the Tribunal.

18. Hence, in our considered opinion, in light of the above said Hon'ble Apex Court decision, a mistake apparent from the record has crept into the order of this Tribunal.

19. As regards the reliance by the ld. Counsel of the assessee in the decision of *Ramesh Electric And Trading Co.* (supra) the same was on the premise that not taking into account the arguments advanced by either of the parties cannot result any mistake apparent from the record. In our considered opin on, the said case law is not at all applicable on the facts of this case, as the mistake apparent from the record in this case has been found to be non consideration of the Hon'ble Apex Court decision on this subject.

20. As regard the Hon ble Bombay High Court decision in the case of *Upendra V. Mithani* (supra) referred by the ld. Counsel of the assessee that the same was considered by the Tribunal in the penalty order as aforesaid, firstly, we note that there is no mention of that the Hon'ble Bombay High Court decision in the said order. Moreover, the mistake apparent from the record in this case has been found to be non consideration of the Hon'ble Apex Court decision on the said subject. By no stretch of imagination, the above said Hon'ble Bombay High Court decision can be said to be dealing with this situation.

21. Accordingly, in the background of the aforesaid discussion and precedent, we are of the considered opinion that the mistake apparent from the record has crept into the

impugned order of the Tribunal. Accordingly, we recall the aforesaid order. The Registry is directed to fix the case before the regular bench in the normal course of hearing.

22. In the result, the miscellaneous petition stands allowed.

Order pronounced in the open court on 05.09.2018

Sd/-	Sd/-
(Joginder Singh) Judicial Member	(Shamim Yahya) Accountant Member

Mumbai; Dated : 05.09.2018
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai